

DATE: JULY 2, 1997
CASE NO. 95-INA-413

In the Matter of:

H.C. GRAPHICS SCREEN PRINTING, INC.
Employer

On Behalf of:

JULIO R. VELASQUEZ
Alien

APPEARANCE: Harlan E. Schackner, Esq.
For the Employer

Before: Holmes, Huddleston, and Neusner
Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

This case arose from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of an application for labor certification. The certification of aliens for permanent employment is governed by Section 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. §1182(a)(5)(A)(the "Act"), and the regulations promulgated thereunder, 20 C.F.R. Part 656.

Under §212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in the Appeal File ("AF"), and any written arguments of the parties. 20 C.F.R. §656.27(c).

Statement of the Case

On July 9, 1993, the H.C. Graphics Screen Printing, Inc., filed an application for labor certification to enable the Alien, Julio R. Velasquez, to fill the position of Supervisor Silk-Screen Printing. The job duties for the position, as stated on the application, are as follows:

Supervises and coordinates activities of workers engaged in fabricating and assembling silk screens and in handprinting, utilizing silk-screen method: Trains workers in performance of tasks, such as photographic screen making, and screen printing. Examines screens for imperfections and compares screens with customer artwork to verify conformance to specifications. Compares paint colors with artwork, color swatches, or samples to verify correct color choice and to ascertain specified register of colors and shifts register marks on silk-screen frame or brushed block lacquer on defective areas of screen to correct color register. Studies production schedules and estimates worker-hour requirements for completion of job assignment. Interprets company policies to workers and enforces safety regulations. Interprets specifications, blueprints, and job orders to workers, and assigns duties. Establishes or adjusts work procedures to meet production schedules, using knowledge of capacities of machines and equipment. Recommends measures to improve production methods, equipment performance, and quality of product, and suggests changes in working conditions and use of equipment to increase efficiency. Analyzes and resolves work problems, or assists workers in solving work problems. Recommends or initiates personnel actions, such as promotions, transfers, discharges, and disciplinary measures. Maintains time and production records.

(AF 14, 16). The only stated job requirement for the position is two years of experience in the job offered (AF 16).

Furthermore, the Employer requested a waiver regarding additional advertising, stating that they had attempted to recruit through posting and advertising, but that it "has not been able to find anyone for the job position." (AF 8). In addition, on the application form, Item 21, the Employer reported the following recruitment efforts and results:

Used personal inquiry - could no (sic) find no one. Advertised for three consecutive days in the Star Ledger - See tear sheets enclosed - Received following responses: Robert Garelick - 437-6265 - No experience on silk-screen printing. John Passamante - 492-0813 - Lack Experience. Richard Montague - 371-3707 - Textile printing experience only. Juan Gomez - 751-2404 - Garment printing experience only. Angel Molina - 313-9132 - Lack of needed experience. Michael W. Brooks-1115 Dill Ave., Linden NJ-908-925-4074 - No Experience in

Silk-Screen. Jeffrey E. Kerstner-42 Manning Ave., Butler, NJ 07405 - 201-838-7578 - No knowledge of process printing. Jesse H. James-1021 Alexander Ave., Ridgefield, NJ-(908) 965-0354 - No specialized silk screen printing experience. Posted notice of employment opportunity, see certification of posting enclosed. No one inquired about the position.

(AF 15).

In the Notice of Findings ("NOF") issued on October 3, 1994, the CO denied Employer's request for a waiver of additional recruitment. Furthermore, the CO proposed to deny certification on the grounds that requirements for the job opportunity are unduly restrictive, in violation of §656.21(b)(2). The CO stated, in pertinent part:

Pursuant to 20 CFR §656.21(b)(2), employer is required to document that his requirements for the job opportunity, unless adequately documented as arising from business necessity, are those normally required for the performance of the job in the United States and as defined for the job in the Dictionary of Occupational Titles (D.O.T.).

Employer indicates that the job opening is for a Supervisor, Silk Screening and Printing and requires two years of experience in the job offered.

In reviewing the job description reflected in item 13 of the ETA-750A form, we note that the job is basically described verbatim to both the D.O.T. definition of duties as defined under the occupational title of Supervisor, SilkScreen Cutting and Printing as well as those described under the D.O.T. Master title definition of Supervisor. The Dictionary of Occupational Titles is intended as a guide and is not meant to be all encompassing. The job description should be reflective of the position as it is normally performed in the employer's establishment. It is unreasonable and unrealistic to require or expect any one individual to be experienced in or to perform all of the duties presently described. Employer's requirement for experience in all of these duties would have a chilling effect on U.S. workers similarly employed. Employer's job description is considered unrealistic and restrictive.

(AF 22).

The CO provided two alternative means by which the Employer could rebut the finding; namely, amend the job description, or, document how the requirement for all of the duties described arises from business necessity under §656.21(b)(2)(i).

The Employer submitted its rebuttal on or about October 31, 1994 (AF 24-27). In pertinent part, the Employer's rebuttal consists of a statement by its President, Herman Mueller, which discusses the various duties in conjunction with his business operations. Furthermore, Mr. Mueller questions the need to establish the business necessity for these duties, because they are

consistent with the normal job duties for a Supervisor - Silk Screen Printing. Finally, toward the end of his statement, Mr. Mueller stated:

We wish to point out that the advertising completed in this case was done prior to filing the application for labor certification and no responses to the advertisement were received. We requested a waiver of further recruitment, which waiver was approved, since we were never directed to readvertise the job. If you will note, the original advertisement contained only the first line of the job opportunity, and no one responded to the advertisement. No applicants were rejected or would have called because they did not have experience in all job duties, since all job duties were not listed.

(AF 24).

The CO found the rebuttal unpersuasive and issued a Final Determination on October 3, 1994, denying certification (AF 30-32).

On December 9, 1994, the Employer filed a request for reconsideration (AF 33-42), which was denied by the CO in a letter, dated December 16, 1994 (AF 43). Subsequently, on or about January 23, 1995, the Employer filed a request for review of the denial of certification (AF 44-62). Thereafter, the CO forwarded this matter to the Board of Alien Labor Certification Appeals for review.

Discussion

20 C.F.R. §656.21(b)(2)(i) states, in pertinent part, that the employer shall document that the job opportunity has been and is being described without an unduly restrictive requirement. Accordingly, unless adequately documented as arising from business necessity, the requirements shall be those normally required for the job in the United States and shall be those defined for the job in the Dictionary of Occupational Titles.

In the Final Determination, the CO rejected the Employer's rebuttal arguments, stating, in pertinent part:

...while rebuttal elaborates on each aspect of the duties to be performed, the position described still remains a "mirror" of the duties as presented under the D.O.T. definitions and as such, are not considered a realistic representation of what any one individual employed in the position would normally be required or expected to do in the performance of his/her job. The evidence submitted does not clearly support business necessity for the experience in such an extensive list of duties from one individual. The fact that employer has previously required (and will continue to require) such numerous duties of the person employed in the position does not make such requirement a business necessity.

With regard to the issue of our denial of employer's request for a waiver of

additional recruitment, employer indicates that the ad placed prior to filing this application contained only the first line of the job description and "no one responded to the advertisement;" hence, employer states no applicants were rejected or would have called because they did not have experience in all job duties as all of the job duties were not listed. Although employer's statement regarding the content of the ad is correct, his rebuttal regarding the results of the advertising conflicts with the documentation presented in item 21 on the ETA-750A form which reflects that there were eight (8) responses to the ad with each applicant being rejected as unqualified due to lack of experience. Although the ad does not list all of the job duties described on the ETA-750A form, there is no way of determining that these applicants were not rejected for lack of experience in any of the unadvertised job duties. While employer states willingness to readvertise, his job description is still considered unrealistic and restrictive. Therefore, further recruitment cannot be pursued.

Due to the above deficiency the application for Alien Employment Certification is denied.

(AF 30-31).

In defining the requirements for a job, experience in the "Job Offered" may include experience performing the listed job duties. Thus, in cases where there is no alternative requirement of experience in a "Related Occupation," the listed job duties may be deemed incorporated into the requirement of experience in the "Job Offered." Integrated Software Systems, Inc., 88-INA-200 (July 8, 1988). An employer, therefore, may reject U.S. applicants who lack experience in some of the key duties. Saritejdam, Inc., 89-INA-87 (Dec. 21, 1989)(certification denied, however, because the alien lacked those requirements).

Accordingly, as found by the CO, the multiple duties listed on the ETA-750A form are, in effect, the stated requirements for the position. As set forth above, the CO instructed the Employer to establish the business necessity for such requirements. Furthermore, as outlined above, the CO found such duties/requirements unduly restrictive because they "mirror" the duties cited in the D.O.T., and because it is unrealistic for one person to perform all of those duties.

Upon review, we find the CO's underlying premise to be erroneous. It is well settled that if an employer does not require an excessive amount of experience in a D.O.T.-listed job duty, the employer does not have to prove business necessity for the job duties. Bel Air Country Club, 88-INA-223 (Dec. 23, 1988)(en banc). Accordingly, we find that, assuming that the Alien had the necessary experience in each and every one of the duties listed prior to his being hired by the Employer, that the job requirements/duties for the position are not unduly restrictive.

On the other hand, we are deeply concerned with the Employer's actions in this case. First, we are troubled by the Employer's failure to list all of the duties in its pre-filing advertisement. (AF 2,3,4). Such action suggests the possibility that many of these duties are not actually required for the position. Moreover, where, as here, the Employer is seeking a waiver of

additional recruitment, such an incomplete advertisement can readily lead to abuse. For example, an employer could advertise a position without specifying various duties; obtain the resumes and credentials of the responding U.S. applicants; determine the deficiencies in the experience of the U.S. applicants; and, subsequently, file the application for certification, list the additional duties therein, and specify that the purported basis for its rejection of the U.S. applicants was the lack of such experience in the newly added duties.

We are also troubled by the apparent conflict between the ETA-750A form, Item 21, which indicates that 8 U.S. applicants responded to the pre-filing advertisement (AF 15), and Employer's President's subsequent rebuttal statement that "no responses to the advertisement were received." (AF 24). We note, however, that the CO should have given the Employer an opportunity to explain this conflict, and not simply cite it in the Final Determination (AF 30-31).

In addition, we find that other than the cursory notations by the Employer on the ETA-750A form, Item 21, we have little evidence to consider regarding the credentials of the 8 U.S. applicants. The record does not include the resumes of the U.S. applicants; information regarding the Employer's attempts to contact them; a detailed report of recruitment results; whether the U.S. applicants were summarily rejected or whether they were interviewed, etc.

Finally, we note that the absence of experience in one or more of the numerous listed duties does not necessarily mean that the Employer's rejection of such applicant is lawful. We have held that the Employer may reject a U.S. applicant who otherwise qualifies only if he/she lacks experience in one of the core or key duties, not simply a minor duty. Marie M. Runyon, 91-INA-380 (Mar. 31, 1993). See also YMCA of Central and Northern Westchester, 93-INA-6 (Mar. 28, 1994)(where Employer improperly rejected a U.S. applicant who met the stated requirements of a degree, Lotus 1-2-3 experience, general ledger and accounts payable and 18 months accounting, but lacked specific experience in managing a personnel office, which was listed in the job duties, but not specified as a minimum requirement).

In most cases, the proper role of this Board is to review the record to insure that the parties have been afforded due process, to review errors of law, and to determine whether substantial evidence in the record as a whole supports the factual findings of the CO. In the present case, however, we find that this application has been flawed from the outset by the actions of the Employer and the CO. As a result, the record is deficient. Therefore, the Employer must engage in a completely new recruitment effort to determine whether there are U.S. workers ready, willing, and qualified to fill this position.

ORDER

Accordingly, the denial of certification is **VACATED**, and this case is **REMANDED** to the Certifying Officer for further proceedings consistent with this Decision.

For the Panel:

JOHN C. HOLMES
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

**Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002**

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within ten days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.